No. 14647.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARRY C. WESTOVER, Former Collector of Internal Revenue, Sixth Collection District of California,

Appellant.

vs.

STOCKHOLDERS PUBLISHING COMPANY, INC., a Corporation, and GEORGE T. GOGGIN, Trustee in bankruptcy for its bankrupt estate,

Appellees.

ROBERT A. RIDDELL, Collector of Internal Revenue, Sixth Collection District of California,

Appellant.

vs.

STOCKHOLDERS PUBLISHING COMPANY, INC., a Corporation, and GEORGE T. GOGGIN, Trustee in bankruptcy for its bankrupt estate,

Appellees.

BRIEF OF APPELLEES.

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BRIEF OF APPELLEES.

This is an appeal taken by the Government from two judgments of the United States District Court, made and entered by Honorable Peirson M. Hall, United States District Judge for the Southern District of California, on July 14, 1954. These judgments were rendered in two separate actions bearing No. 14647-PH in the sum of $8,796.64, and No. 11,879-PH in the sum of $17,013.04. The issues in both cases were identical except as to names of defendants and dates, and were consolidated for trial by stipulation in open court on June 29, 1954. [Tr. of Rec. pp. 52-53.]

In outlining the issues involved, it was tacitly conceded by counsel for the Government and counsel for the original plaintiff, Stockholders Publishing Company, Inc., now in bankruptcy, that there was but one issue involved, namely, the sole question as to whether or not certain district route managers and dealers were employees of the bankrupt Stockholders Publishing Company, Inc., or were independent contractors, and in the event they were found to be independent contractors as a matter of fact, the bankrupt corporation, Stockholders Publishing Company, Inc., would be entitled to recover a refund of unemployment insurance assessments theretofore paid by the bankrupt corporation. [Tr. of Rec. pp. 62-63.]

The Court then proceeded to take the testimony of the witnesses Arthur G. Pollock [Tr. of Rec. pp. 65-94, incl.], F. B. Fahs [Tr. of Rec. pp. 95-108, incl.] and C. D. Melton [Tr. of Rec. pp. 109-115, incl.], all of whom were called on behalf of the plaintiff. It was stipulated at page 116 of the record that the plaintiff had a number of other witnesses, but that their testimony would be cumulative. At page 117 it was stipulated that if a Fred Hummel, Harry Waters and Glenn Murray were called, their testimony would be substantially the same as the witnesses examined.

The Government called one witness, Samuel G. Mahdesian, whose testimony is found in the transcript of record, pages 117 to 128, inclusive.

After argument, the Court expressed its view from the bench to the effect that the route managers and dealers were independent contractors and not employees of the now bankrupt corporation, and thereafter made formal findings of fact and conclusions of law accordingly.

The viewpoint of the trial court is set out in the transcript of record, pages 129 to 131, inclusive.

Subsequent to the rendition of the judgment, and after the notice of appeal had been filed herein, the Stockholders Publishing Company, Inc., was adjudged a bankrupt in the United States District Court for the Southern District of California, Central Division. George T. Goggin was elected Trustee and obtained permission from the Referee under the provisions of Section 11-c of the National Bankruptcy Act to prosecute as Trustee the defense of the Government's appeal in this case. Application was made to this Court for substitution of the Trustee as party appellee, and an order was made accordingly.

ARGUMENT, POINTS AND AUTHORITIES.

The only issue, as we see it, before this Court is the question of whether or not Judge Peirson M. Hall's findings of fact that the district managers and dealers were independent contractors is a correct finding of fact. We have been unable to find any definite assignments of error on the admission of any evidence or the exclusion thereof. The statement of points to be urged by the appellant, appearing at page 6 of this brief, deals only with the errors on the findings of fact made by the District Court, although in the statement of points upon which appellants intend to rely on appeal [Tr. of Rec. 137 *et seq.*], two indefinite points, numbers VI and VII vaguely assert that "the trial court erred in certain rulings wherein the testimony of plaintiff-appellees' witnesses was admitted into evidence over the objection of defendants-appellants' counsel," and "that the trial court

erred in sustaining the objection of plaintiff-appellees' counsel to certain questions propounded by defendants-appellants' counsel, notwithstanding an offer of proof."

In no way has appellant, either in its brief or its points, specified the errors in ruling on admissibility of evidence in accordance with Rule 20-d of this Court, and we assume that they have been abandoned. (See *Sampsell v. Anches,* 108 F. 2d 945, at p. 948.)

We therefore believe that the sole question before this Court is whether or not the District Judge erred in his finding of fact that these dealers were independent contractors and not employees. We submit that there was substantial evidence received and considered by the District Judge to justify such findings, and there being substantial evidence to sustain such findings, an Appellate Court will not reverse unless they are entirely unsubstantiated by the evidence.

Attacks on the Social Security and Unemployment Insurance Laws have been varied, and decisions thereon are still, in many respects, in a state of flux. We believe, however, in this case, District Judge Hall was justified in his clear finding of fact that these dealers were independent contractors and not employees.

Section 1606 of Title 26, U. S. C. A. defines wages as follows:

> "The term 'wages' means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; * * *."

The evidence in this case clearly shows throughout that the Stockholders Publishing Company, Inc. paid no remuneration to its route managers and distributors, but

simply sold newspapers to them to be resold by them at a profit. Any losses incurred in the resale were suffered by the distributors and were not absorbed by the Stockholders Publishing Company unless it overbilled an order, and then only to the extent of the excess papers delivered over and above the distributor's order. We wish to call the Court's attention to the undisputed testimony of the witnesses which substantiate this assertion.

The witness Arthur G. Pollock, whose testimony begins at page 65 of the transcript of record, testified, on page 66, that he was familiar with the overall operation of the circulation department of the Daily News, the paper published by the plaintiff, and that the overall picture was the same in 1943, 1944 and 1945, as it was at the time of the trial. On page 67 he testified:

> "A. Well, during that period route men and dealers purchased their papers at varied wholesale rates. They in turn resell those papers to the carrier boys. The carrier boys in turn sell them at retail to the subscriber."

On page 68 of the transcript, we quote:

> "The Court: Now a route district man, I take it, is somebody who has, say, the West Adams district?
>
> The Witness: That is correct.
>
> The Court: In other words, he buys papers from you for resale to carrier boys in the West Adams district?
>
> The Witness: That is correct.
>
> The Court: So the city is divided into districts?
>
> The Witness: That is correct."

At transcript page 69, the same witness testified as follows:

"Q. (By Mr. Binford): Now you mentioned that you sell to the dealers and route district men at varying wholesale prices. Will you explain that, and why? A. We have no set rate for the reason depending on conditions in that particular area. One area, for instance, may be scattered as to the subscribers, which would take more time, they would be able to handle less papers, the terrain may be hilly, so it may be necessary even to have a car route where a boy on a bicycle couldn't deliver.

All those factors are taken into consideration.

The Court: And in those cases they buy their papers wholesale from you at lesser rates?

The Witness: That is right.

Q. (By Mr. Binford): Then they, as you testified, resell the papers to the carrier boys. Do you fix the price at which they should sell these papers to the carrier boys? A. No, those prices are fixed to a degree by consultation. There is a range that we suggest in order to shall I say, protect the carrier boys from some unscrupulous dealer who might take advantage of them."

At page 70 of the transcript of record, we find the following:

"The Court: When the route district men and the dealers buy, they pay you direct?

The Witness: Yes, sir, on a monthly basis.

The Court: You bill them and they pay you?

The Witness: We bill them for the number of papers they draw each month, but they can change their draw daily. Whatever they draw each month

is totaled at the end of the month and they are billed for that at whatever their rate is.

Q. Then it is up to them to collect ultimately from either the newsboy or the subscriber? A. That is right."

At page 72 of the transcript of record, we find the following:

"Q. (By Mr. Binford): Now under the provisions of that agreement you require a bond of some sort to be put up by the dealers and route district men, is that correct? A. Correct.

Q. How much is that bond, and tell us about the bond, what it is for. A. Well, the bond varies of course in amount and it is arrived at basically on the basis of one and one-half months paper bill. It is used as collateral against the non-payment of the circulation bill.

Q. And what is it, is it a cash bond or is it securities or does it vary depending upon a particular district man or dealer? A. Well, I would say with the exception of probably two or three cases it is a cash bond.

Q. Now a dealer orders a certain number of papers per day with you, is that correct, of the Daily News? A. That is correct.

The Court: They vary from day to day?

The Witness: That is correct.

Q. (By Mr. Binford): It may be up or down day by day? A. That is right.

Q. Supposing he orders ten too many on a given day and you billed him at three and a half cents per paper. Does he lose that 35 cents or is he permitted to return these papers to the Daily News?

A. Well, now, when you say three and a half cents, you mean whatever his rate is?

Q. Whatever his rate is. A. Whatever he orders he pays for.

The Court: Regardless of whether he sells them or not?

The Witness: That is right."

At page 74, we find the following testimony by the same witness:

"Q. (By Mr. Binford): Now with respect to the route district men and dealers, do you make a deduction—if that were possible—for social security for these men? A. No.

Q. Men? A. No.

Q. And do you deduct any sort of withholding tax, withholding on income from these men? A. No.

Q. And do you pay the State of California any amount of money for unemployment? A. No."

At page 81 of the transcript of the record, we find the following:

"Q. Are these men, or do these men, either dealers or route district men or both, occasionally hire helpers or assistants? A. Well, I understand that they do.

Q. Does the Daily News or the Stockholders Publishing Company pay the salary of the assistants? A. No.

Q. In other words, they can hire assistants without your knowledge, I take it from your testimony? A. That is true.

Q. Do you furnish any equipment to the route district men or dealers in order to aid them in their

distribution of the newspapers? A. Not as to the distribution. We do furnish racks.

Q. But you don't furnish things like automobiles or other equipment? A. No."

On the question of who would make the profit on the resale of these papers or bear the loss in other events, we find the following testimony of Mr. Pollock at page 82 of the transcript of record:

"Q. Now if a man put papers on the rack and some citizen steals the paper, who loses the money? A. Well, he still pays for the papers that were billed to him.

Q. So he loses the money? A. He loses the money."

That these dealerships were in the nature of franchises covering designated territory (see *Chevrolet Motor Company v. McCullough Motor Co.*, 6 F. 2d 212 at 213), is evidenced by the following testimony at page 87 of the transcript of record:

"Q. (By Mr. Hochman): Mr. Pollock, suppose X was a district route man and he wished to increase the amount of money he was making could he go into a new section of town and begin a campaign for subscribers by himself? A. No, he has to stay in the territory in which is assigned to him. If there was no business in that territory, but if it came under his general territory, he could. But he couldn't as an individual just go anywhere he so desired.

Q. I didn't have reference to anywhere that he so desired, I had reference to a territory where no one else was. A. Well, the city is divided up so that all the territory is covered. Now I suppose he could go in there and solicit and get paid for

new orders that his carriers make through carrier prizes, or what have you, but he could not get the earnings from serving the subscribers outside of his own territory.

Q. Is it true that an area of a given man can be reduced by the company, Stockholders Publishing Company, whether or not the man wants it reduced? A. That can be done, yes.

Q. That can be done? A. That can be done, either reduced or increased.

Q. By action of the paper, is that correct? A. Well, it is done by mutual agreement."

Again on page 88 of the transcript of record, we find:

"Q. (By Mr. Hochman): Did the company ever reduce a man's district without his consent? A. Not without consultation."

And again with regard to purchase and resale, the same witness testified at page 89 as follows:

"Q. Mr. Pollock, relative to understanding the complete operation here, the newspaper sells the paper to the district men who in turn sell it to the carriers, is that correct? A. That is correct.

Q. Is it your testimony that the newspaper has nothing to do with the price that the district man charges the newspaper carrier? A. Well, I believe I testified that there was a suggested price in there. The prices or the rates to the carrier boys are not all alike. There are many, or at least several, different rates."

The second witness, F. B. Fahs, testified at page 95 as follows:

"A. Well, I buy my papers from the Daily News. I am billed for the papers once a month. The bill is

due on the 10th of the month. The papers in my care are delivered to me by truck at a corner in the city of Lynwood, and that is at the moment. In prior years they were distributed wherever the spots happen to be by mutual agreement with me and the Daily News. The truck spots them at one or perhaps more specific places where I then pick them up and further distribute them to corners or to carrier boys' homes.

Q. Do you do that in a car? A. I do that in my own car."

That the District Managers or distributors bore losses sustained as a result of absconding subscribers and purchasers, is evidenced at page 97 of the transcript of record:

"Q. Supposing that they had somebody walk out on them and didn't pay their bill for the $1.60 a month, who loses that $1.60? A. Theoretically the carrier boy loses it. I bill him for so many papers and he is billed for those papers and he pays for those papers.

As a matter of practical practice, I and many district men—I will speak for myself—will bonus, discount or give the boy a rebate for that move-out.

Q. In other words, so that you will absorb at least possibly some of such loss yourself? A. That is correct.

Q. Does the Daily News reimburse you for that loss? A. No, sir."

The independence of these district distributors is evidenced likewise by Mr. Fahs' testimony at page 97 of the record:

"Q. Now do you have a helper, or have you ever had a helper on your route? A. Yes, sir.

Q. Did you hire him yourself? A. Yes, sir.

Q. Did you pick him out yourself? A. Yes, sir.

Q. Did you pay him a salary or wage? A. I paid him a salary.

Q. And do you deduct social security for him? A. I do.

Q. And does the Daily News reimburse you for the money you pay out for this salary? A. No, sir.

The Court: Does the quantity of papers vary from day to day?

The Witness: It is at my discretion, sir."

At pages 98, 99 and 100, the witness Fahs described his method of doing business. He testified that he had a separate establishment at his home, that he and his wife prepared the bills and receipts to his customers and had the carriers present them on the 25th of each month. Where the customer paid the bill, the carrier tore off the already prepared receipt after signing it, gave it to the customer and delivered the funds to the district distributor. In the event of the dishonoring of a check given by a customer, the check came back, not to the Daily News, but to the distributor. This distributor made an income tax return to the United States Government containing a statement of profit and loss for the year of 1953. [Tr. of Rec. p. 101.] The Daily News did not ever bill this witness for Social Security, nor did it withhold any withholding or income tax or State unemployment tax from him.

That he personally sustained losses for unsold papers in his territory is clearly evidenced at page 102 of the transcript:

> "Q. (By Mr. Binford): If you draw too many papers on a given day—
>
> The Court: 'Too many' meaning more than he can sell?
>
> Q. (By Mr. Binford): —more than you can sell, and you have, say, ten papers left over on a day, does the Daily News give you credit if you return those papers? A. No, sir.
>
> Q. They are a loss to you for whatever you pay for them? A. Assuming I have ordered so many, X number of papers, I pay for them whether I sell them or not. If they send me extra copies by error I can return them.
>
> Q. But if they fill your order and you have ordered too many it is your loss? A. Correct."

At page 106, the same witness testified:

> "The Witness: I frankly have had very little supervision. You asked the question and let me answer you. Did I do this, or did I do that, or did I not do that? I buy my papers, I put them out, I pay the bill, and aside from a pep talk, a letter, a promotion letter, a suggestion, let's get the boys together to the Pike, or something of that nature, I am let alone. That is why I like my job."

Again on page 107:

> "It isn't a matter of, 'Go down in your car and take them a paper right now.' I have never been ordered to do anything of that nature.
>
> The Court: All they do is to relay the complaint to you?

The Witness: They relay it to me and of course it is to my own interest to take care of it."

The third witness, C. D. Melton, testified at page 109:

"Q. Are you billed for those papers by the Daily News? A. Yes, sir."

At page 110:

"Q. Now the carrier boys deliver them to the ultimate consumer or subscriber. Do they send out the billings themselves, the carrier boys? A. No. I make the bills out and furnish them to the boys and they make the collections and pay their bills."

Again at page 110:

"Q. (By Mr. Binford): If there is a move-out, who stands the loss? A. Well, the boy understands when he takes the territory that he stands all losses but I absorb some of it through bonuses. I always mail a bill to the people. All losses, practically all, are move-outs, and if I can't find out from the neighbors where they moved to or collect it for him, or have another district man who is in that part of town, then I mail the bill and give the boy credit at least for the amount of the papers, the cost of those papers.

Q. So he won't take quite as much of a loss? A. Yes, sir. * * *

Q. (By Mr. Binford): Now if you order more papers than you need on a given date, does the daily News give you credit for returned papers? A. No, sir. If I want to change up or down I call it in every day and if I don't then there is extra papers and I pay for whatever comes out on the truck every morning."

With regard to his independence in hiring help, Mr. Melton testified at page 112:

> "Q. (By Mr. Binford): You say you have hired helpers in the past. Did you pay their salaries or wages? A. Salary or commission, whatever it happened to be.
>
> Q. Did the Daily News reimburse you for whatever you paid them? A. No, sir, never."

On page 114, the witness Melton testified:

> "The amount of money I make is the difference between the rate that the Daily News bills me for the papers and the amount that I bill and collect from the carrier boys.
>
> The Court: Does the Daily News determine what you shall bill and collect from the carrier boys?
>
> The Witness: They never have since I have been there ever said, 'You make the rate so-and-so.'
>
> The Court: Do you fix those rates by negotiation with the boys?
>
> The Witness: By negotiation with the boys."

On page 115, the witness Melton testified:

> "Q. (By Mr. Binford): Do you use a car in your business? A. Yes, sir.
>
> Q. To distribute the newspapers to your carrier boys? A. Yes, sir.
>
> Q. Does the Daily News pay for any of the expense of that car? A. No, sir."

The testimony of the witness Samuel G. Mahdesian, called by the Government, did not, so far as we have been able to ascertain, in any material respect contradict the testimony given by the three witnesses called by the plaintiff.

THE LAW.

We note that appellant places strong reliance on the case of *Labor Board v. Hearst Publications,* 322 U. S. 111, wherein the United States Supreme Court reversed this Court on the question of whether or not newsboys were employees of the four Los Angeles papers involved, or were independent contractors. That case came before this Court (136 F. 2d 608) on petition for a review and enforcement of orders of the National Labor Relations Board. The newspapers involved sought to reverse the orders of the National Labor Relations Board, and the National Labor Relations Board petitioned this Court for orders of enforcement. In a two to one decision rendered by Judges Stephens and Mathews, the orders of the National Labor Relations Board were set aside. Judge Denman dissented but was careful to point out that the reason for his dissent was that the National Labor Relations Board, as a trier of fact, had made certain findings which he did not feel that this Court, as an Appellate Court, had a right to overturn. In fact, he qualified his dissent in the following language:

> "If I were free to draw my own inferences from the testimony, I would decide that they were independent contractors, engaged in their own businesses on their respective spots."

Certiorari was granted and the Supreme Court of the United States reversed.

It is significant, however, that the reversal was based on the fact that the original trier of fact had found and concluded that the newsboys in question were employees of their respective papers. The situation is exactly the opposite here. In the *Hearst Publications* case, the original

trier of fact was the National Labor Relations Board, the members of which had taken the testimony, had judged the credibility of the witnesses, and had arrived at certain facts and conclusions. This Court reversed, but as pointed out heretofore in his dissenting opinion, Judge Denman was careful to emphasize that the reason for his dissent was the finality to be accorded to a finding of fact by a trial tribunal where there was substantial evidence to support it, even though he himself would have held differently had he been the original trier of fact.

Justice Reed, speaking for the Supreme Court, followed the same line of reasoning. He said:

> "In making that body's determinations as to the facts in these matters conclusive, if supported by evidence, Congress entrusted to it primarily the decision whether the evidence establishes the material facts. Hence in reviewing the Board's ultimate conclusions, it is not the court's function to substitute its own inferences of fact for the Board's, when the latter have support in the record. National Labor Relations Board v. Nevada Consol. Copper Corp., 316 U. S. 105; Walter v. Altmeyer, 137 Fed. (2d) 531. * * *
>
> "Stating that 'the primary consideration in the determination of the applicability of the statutory definition is whether effectuation of the declared policy and purposes of the Act comprehend securing to the individual the rights guaranteed and protection afforded by the Act,' the Board concluded that the newsboys are employees. The record sustains the Board's findings and there is ample basis in the law for its conclusion."

In *Radio City Music Hall Corp. v. United States,* 135 F. 2d 715, cited by appellant at pages 13 and 27 of appellant's brief, we find the Court of Appeals for the Sec-

ond Circuit affirming a judgment in favor of the plaintiff for refund of Social Security taxes erroneously collected. The case was determined by the District Court for the Southern District of New York on a summary judgment, and the Government appealed. In affirming the District Court, the Court of Appeals disposed of the question as to whether or not actors performing in a theatre were employees or independent contractors because of some supervision exercised over them by the plaintiff, in the following language (p. 718):

> "In the case at bar the plaintiff did intervene to some degree; but so does a general building contractor intervene in the work of his subcontractors. He decides how the different parts of the work must be timed, and how they shall be fitted together; if he finds it desirable to cut out this or that from the specifications, he does so. Some such supervision is inherent in any joint undertaking, and does not make the contributing contractors employees. By far the greater part of Markert's intervention in the 'acts' was no more than this. It is true, as we have shown, that to a very limited extent he went further, but these interventions were trivial in amount and in character; certainly not enough to color the whole relation."

In the case at Bar, the supervision exercised by appellee was purely of a promotional nature. The mere fact that occasionally conferences, pep talks and promotional activities were participated in by the Stockholders Publishing Company, Inc., was nothing more than the ordinary type of campaign to increase sales of its product and thus indirectly profit thereby. In fact, Judge Hall, in our opinion, hit the nail on the head, where at page 133 of the Record he dryly expressed himself as follows:

"The Court: That does not make them employees. It is just general knowledge that a manufacturer, for instance, will put on all kinds of promotional advertising but he still sells beer to the corner groceryman who is an independent contractor and he sells it to him in any way that he can. But because the brewery might put on some singing commercial or put billboards all over a state or put out newspaper advertising, that does not make an employee."

United States v. Silk, et al., 331 U. S. 704, cited by appellant at page 11 of appellants' brief, seems to us to support the position of the lower court rather than undermine it. In that case, the Supreme Court took jurisdiction over two Social Security controversies. One involved a group of men who were unloading coal from cars for the Silk Coal Company. The other case involved a trucking concern which employed other truckers to assist in its activities. In so far as the Silk Coal Company was concerned, the men employed by it to unload coal from freight cars into its bins provided only picks and shovels. As Justice Reed said in his majority opinion:

"* * * we cannot agree that the unloaders in the Silk case were independent contractors. They provided only picks and shovels. They had no opportunity to gain or lose except from the work of their hands and these simple tools. That the unloaders did not work regularly is not significant. They did work in the course of the employer's trade or business. This brings them under the coverage of the Act. They are of the group that the Social Security Act was intended to aid. Silk was in a position to exercise all necessary supervision over their simple tasks. Unloaders have often been held to be employees in tort cases."

In the case at Bar, the distributors were in an entirely different position. They stood to gain or lose from the profits or lack of them, obtained in the resale of newspapers to which they had committed their credit resources or their cash to purchase and thus acquire title. The coal heavers in the *Silk* case were, as the Irishman once said, "asked to leave me head at home, to bring me strong back and shoulders every time." (Johnston's "Prison Life is Different," p. 95.)

However, in the same case, the Supreme Court differentiated between the laborers unloading coal and truck drivers, and held that the trucking company and its subordinates were independent contractors. Said Justice Reed:

> "But we agree with the decisions below in Silk and Greyvan that where the arrangements leave the driver-owners so much responsibility for investment and management as here, they must be held to be independent contractors. These driver-owners are small businessmen. They own their own trucks. They hire their own helpers. In one instance they haul for a single business, in the other for any customer. The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors."

In the case at Bar, these district distributors maintain their own offices at their homes. They use their own automobiles in distributing papers to the carriers after they had been unloaded by the Daily News at a drop point, and after they had incurred liability for the purchase price

thereof. They hired boys and other assistants as they chose without any direction from the Stockholders Publishing Company, Inc., and without any responsibility on its part to pay them. Certainly if one of these assistants employed by the distributors was not paid his wages, we do not believe any Court in California or anywhere else would have entertained a suit by such employee against the Stockholders Publishing Company, Inc., but would have rendered judgment against the actual employer, the district distributor. If the district distributor failed to pay for his papers, certainly he would be the proper party defendant in an action to recover the amount of the monthly bill rendered to him by the Stockholders Publishing Company, Inc. The Court would be compelled to find, as did the lower court here, that the distributor had purchased and agreed to pay the Stockholders Publishing Company, Inc., for a certain number of papers worth a certain amount, and had failed to do so. If, on the other hand, these district distributors were mere employees, the writer of this brief cannot conceive of any type of complaint that could possibly be framed and made to stand up, to the effect that these distributors had failed to distribute a certain number of papers in a given period. Every element involving vendor and purchaser was present in the transactions described before the District Court. The Stockholders Publishing Company, Inc., sold these papers without any strings attached to the district distributors, and they thereafter resold them to Newsboys and subscribers.

The District Distributors Were Nothing More nor Less Than Franchise Dealers in the Daily News and Independent Contractors.

In *United States v. Mutual Trucking Company,* 141 F. 2d 655, the Court of Appeals for the Sixth Circuit said:

> "We are confirmed in our conclusion by the fact that the tax is expressly required to be computed upon the total wages paid or payable *by the employer.* Title 42, U. S. C., Secs. 1001, 1101, 42 U. S. C. A., Secs. 1001, 1101; Title 26, U. S. C., Secs. 1400, 1600, 26 U. S. C. A. Int. Rev. Code, Secs. 1400, 1600. In this case the appellee paid no wages. The record shows in two instances what wages were paid by the owner-operator. It was testified that the driver received the union scale of two cents a mile. If all wages were paid by this scale they would not exceed twenty-one per cent of the full amount paid to the owner-operators by the appellee. However, the Collector, without any evidence upon this question, determined that a third of the sum paid to the owner-operators constituted wages. This was an arbitrary and illegal determination. Presumably the wages may have varied as between the different owner-operators. As was persuasively said in an analogous decision of the Supreme Court of Ohio, 'The undisputed facts in this case show the impossibility of determining premiums based upon a payroll when there is none, and there can be none in such a situation.' Coviello v. Industrial Commission, *supra* (129 Ohio St. 589, 196 N. E. 663).
>
> "The judgment is affirmed." (Italics ours.)

To the same general effect see:

Fay v. German General Benevolent Society, 163 Cal. 118;

Zipser v. Ewing (C. A. 2d Cir.), 197 F. 2d 728;

Anglim v. Empire Star Mines Co. (C. C. A. 9th Cir.), 129 F. 2d 914;

Texas Company v. Higgins (C. C. A. 2d Cir.), 118 F. 2d 636;

Shreveport Laundries v. United States, 84 Fed. Supp. 435;

W. P. Brown & Sons Lumber Co. v. United States, 55 Fed. Supp. 103.

Conclusion.

We respectfully submit that the judgment of the District Court should be affirmed. The evidence and the issues involved were squarely placed before Judge Peirson Hall, and every fact pertaining to the relationship between these district distributors and the bankrupt Stockholders Publishing Company, Inc., was brought out. The Court found, as a matter of fact, that these district distributors were retail dealers or middlemen between the producer, Stockholders Publishing Co., Inc., and the ultimate consumer, the readers of its papers. The District Managers stood to gain or lose, to rise or fall in proportion to the managerial skill and acumen displayed in their respective territories. If they foolishly or stupidly overordered the papers which couldn't be disposed of, they stood to lose, as they had entered into a contract whereby they had purchased these papers, and which apparently provided for no sales returns or allowances. Unfortunate credit extensions by their employees, the newsboys who

delivered papers to the homes of purchasers, were absorbed by them to the extent of the cost price to the Stockholders Publishing Company of the papers delivered and remaining unpaid for. No wages, as specifically defined in Section 1607-b of Title 26, Chapter IX, U. S. C. A., were paid to them. Withholding tax was not levied on them through the medium of the Stockholders Publishing Company, Inc., for the very good reason that withholding their future profits from the resale of newspapers would be impossible.

We respectfully submit that not only is the finding of Judge Hall supported by substantial evidence, but there is really no evidence to the contrary and the judgments should be affirmed.

Dated: June 24, 1955.

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